PB87-157475

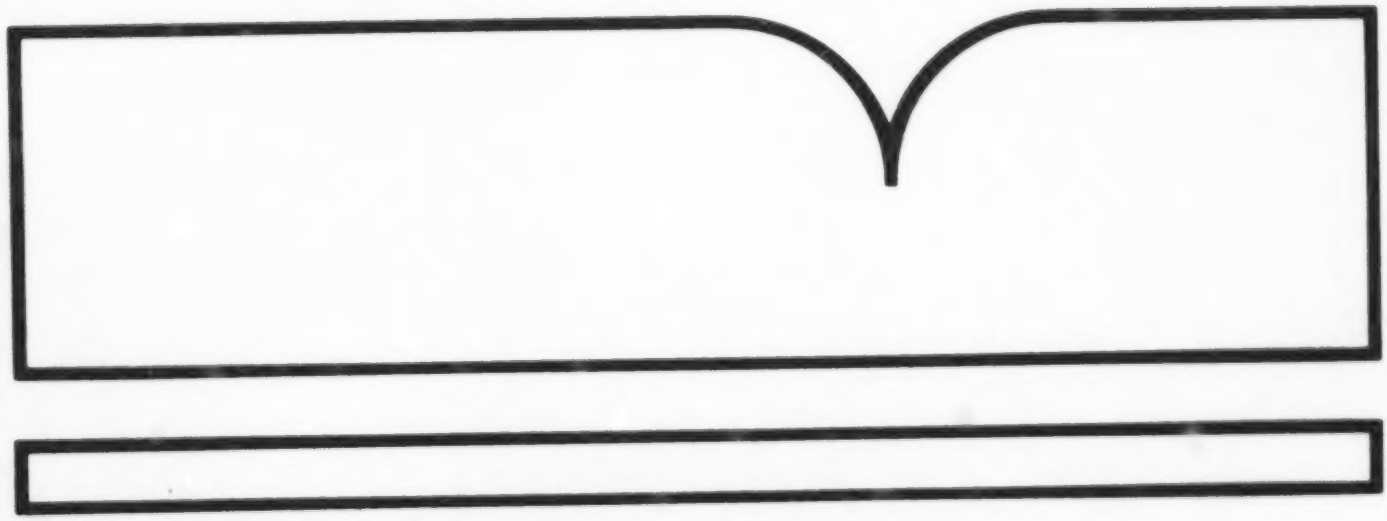
Equivalency of State Financial Responsibility Mechanisms

ICF, Inc., Washington, DC

Prepared for

Environmental Protection Agency, Washington, DC

Sep 82



U.S. Department of Commerce
National Technical Information Service
NTIS

PB87-157475

EQUIVALENCY OF STATE FINANCIAL RESPONSIBLITY MECHANISMS

DRAFT DOCUMENT
FOR AGENCY REVIEW ONLY

t by:
ICF orated
September 1982

REPRODUCED BY
U.S. DEPARTMENT OF COMMERCE
NATIONAL TECHNICAL
INFORMATION SERVICE
SPRINGFIELD, VA 22161

50272-101

REPORT DOCUMENTATION PAGE	1. REPORT NO.	2.	3. Recipient's Accession No. PB87-157475/AS
4. Title and Subtitle: Eqivalency of State Financial Responsibility Mechanisms			5. Report Date: September, 1982
7. Author(s)			8. Performing Organization Rept. No.
9. Performing Organization Name and Address: ICF Incorporated			10. Project/Task/Work Unit No.
			11. Contract(C) or Grant(G) No. (C) (G)
12. Sponsoring Organization Name and Address: U.S. Environmental Protection Agency, 401 M Street, S.W., Washington,D.C. 20460			13. Type of Report & Period Covered: Draft, 1980-1982
			14.

15. Supplementary Notes

16. Abstract (Limit: 200 words)

This document was prepared for Agency review in issuing financial responsibility standards under RCRA, the Agency determined that such requirements are (1) necessary to assure that funds will be available for proper closures of all hazardous waste management facilities, and for 30 years of post-closure care of land disposal facilities, and (2) desirable, in the care of liability coverage, to assure that funds will be available during the operating life of a facility from which third parties can be compensated for bodily injury and property damage arising from operation of the facility. These determinations are bated on extensive analysis and review of public comments and consequently define the scope, purpose, and function of any state financial responsibility regulation under RCRA.

17. Document Analysis a. Descriptors

b. Identifiers/Open-Ended Terms

c. COSATI Field/Group

18. Availability Statement	19. Security Class (This Report)	21. No. of Pages
Unclassified	Unclassified	
	20. Security Class (This Page) Unclassified	22. Price

(See ANSI-Z39.18) See Instructions on Reverse

OPTIONAL FORM 272 (4-77) (Formerly NTIS-35) Department of Commerce

Table of Contents

	Page
Introduction	1
Equivalence for Purposes of State Program Authorization	2
Equivalence of State-Required Mechanisms Used to Comply with the Federal Regulations	3
Fundamental Criteria for Equivalence Determinations	4
Certainty and Availability of the Funds	4
Amount of Funds	5
Time Limits	6
Allowable Mechanisms	7
Cost Estimates	8
Further Information	8
Equivalency Criteria for Trust Funds	9
Equivalency Criteria for Surety Bonds	11
Equivalency Criteria for Letters of Credit	13
Equivalency Criteria for Standby Trust Funds	15
Equivalency Criteria for Closure or Post-Closure Insurance	17
Equivalency Criteria for Financial Test and Corporate Guarantee for Closure or Post-Closure Care	19
Equivalency Criteria for Cash Deposits and Certificates of Deposit for Closure or Post-Closure Care	22
Equivalency Criteria for Escrows for Closure or Post-Closure Care	23
Equivalency Criteria for Liability Insurance	25
Equivalency Criteria for Financial Test for Liability Coverage	27
Equivalency Criteria for State Assumptions of Responsibility of Closure or Post-Closure Care or Liability Coverage	29

EQUIVALENCY OF STATE FINANCIAL RESPONSIBILITY REQUIREMENTS

Introduction

In issuing financial responsibility standards under RCRA, the Agency determined that such requirements are (1) necessary to assure that funds will be available for proper closure of all hazardous waste management facilities, and for 30 years of post-closure care of land disposal facilities, and (2) desirable, in the case of liability coverage, to assure that funds will be available during the operating life of a facility from which third parties can be compensated for bodily injury and property damage arising from operation of the facility. These determinations are based on extensive analysis and review of public comments and consequently define the scope, purpose, and function of any state financial responsibility regulations under RCRA.

States seeking authorization to administer their hazardous waste programs in lieu of the federal RCRA program either have or will have financial requirements. States that are not seeking such authorization, however, may also enact financial responsibility requirements applicable to owners and operators of hazardous waste management facilities. In either instance, in reviewing state financial responsibility requirements, the key criterion is equivalence to the federal requirements.

The review of equivalency of financial responsibility requirements is necessarily somewhat more judgmental than is the case for other hazardous waste management standards. While the federal regulations (40 CFR Parts 264 and 265, Subpart H) serve as a benchmark, the use of more flexible criteria is essential for two reasons:

(1) States often have more restrictive or curtailed enabling statutes with respect to financial responsibility that make it difficult to track the federal requirements; and

(2) Equivalency of outcome or performance of financial assurance is more important than equivalency of methods.

The concept of equivalency originates in Section 3006 of RCRA. That section provides for the authorization of state hazardous waste programs that are equivalent to the federal program. It also provides for the interim authorization of existing state programs that are "substantially equivalent" to the federal program. The concept of equivalence also appears in the Agency's financial responsibility regulations at 40 CFR 264/265.149 and 264/265.150. Those regulations permit owners or operators to use state-required mechanisms for financial responsibility or state assumptions of responsibility to meet federal requirements, in whole or part, if the state-required mechanisms are equivalent to the federal provisions. Thus equivalence evaluations may be performed in two contexts: (1) as part of the review of state financial regulations for interim or final program authorization or (2) as part of the review of an owner's or operator's

compliance with federal requirements in states without authorization that have financial requirements.[1]

Therefore, this guidance has a dual purpose. It addresses:

(1) determining equivalence of a state's regulatory scheme for financial responsibility in the RCRA program authorization context, and

(2) determining equivalence of individual mechanisms in the 264.149/150 and 265.149/150 context for the owner or operator who must comply with both federal and state requirements.

These two topics are addressed next in more detail.

Equivalence for Purposes of State Program Authorization

Pursuant to RCRA §3006(b), for a state program to receive final authorization, it must (1) be "equivalent" to the Federal program, (2) be consistent with the Federal program and the programs of other authorized states, and (3) provide adequate enforcement. EPA has interpreted the term "equivalent" to mean "equal in effect." (See 45 Fed. Reg. 6733; January 29, 1980). Moreover, pursuant to RCRA §3009, states may impose "any requirements ... which are more stringent than those imposed" by the Federal regulations, but may not impose any requirements less stringent than the Federal requirements. In the context of financial responsibility, EPA will make judgments of the legal efficacy of the various financial mechanisms in a state's program which owners and operators may use to demonstrate compliance; the Agency intends that, for a state program to receive final authorization, the program include requirements no less than "equal in effect" to the Federal requirements for financial assurance of closure and post-closure care, and the accompanying requirements for closure and post-closure cost estimates, promulgated at 47 Fed. Reg. 15047-74 (April 7, 1982), and liability coverage for third party claims, promulgated at 47 Fed. Reg. 16554-61 (April 16, 1982).

Pursuant to RCRA §3006(c), for a state program to receive interim authorization, it must be found to be "substantially equivalent" to the Federal program. The Agency has interpreted substantial equivalence to mean "to a large degree or in the main, equal in effect." (See 45 Fed. Reg. 6754; January 29, 1980). Moreover, RCRA §3009 was clearly not intended to mandate application of a "no less stringent" standard to a state seeking only interim authorization. (See 45 Fed. Reg. 33391; May 19, 1980). Thus it is possible that EPA could grant interim authorization to a state program where the

---

[1]For facilities in states without RCRA authorization but with financial responsibility requirements applicable to hazardous waste management facilities, owners or operators must comply with both federal and state regulations.

financial mechanisms allowed under the program were less than "equal in effect" to the April 1982 Federal regulations cited above.

For both interim and final authorization, a state financial responsibility regulatory program should contain the following components:

(1) regulations concerning cost estimates for closure and post-closure care, and

(2) regulations describing allowable mechanisms and the conditions of their use (e.g., combinations of mechanisms, eligibility of insurers, incapacity of institutions).

Below, equivalence criteria for cost estimate regulations are set forth. Later in this document, specific equivalence criteria for individual state financial mechanisms are provided. These criteria are all based on the benchmarks provided by Subpart H of 40 CFR Parts 264 and 265.

Where the types of allowable mechanisms or their specific provisions (e.g., financial test criteria) are not defined by state statute, the state regulations must define the specifics of each allowable mechanism in order that EPA can make a determination of equivalence. Also, where a state program allows types of financial responsibility mechanisms that are not allowed by the federal program, the equivalence criteria included in this document should be consulted. The Agency expects that several states will seek to allow mechanisms such as escrows, cash deposits, and certificates of deposit which are not allowed in the federal program. (For an explanation of why these mechanisms haven't been provided in the federal program, see the Preamble at 46 Fed. Reg. 2827 (January 12, 1981).)

Equivalence of State-Required Mechanisms Used to Comply with the Federal Regulations

When an owner or operator wishes to use a state-required mechanism or a state assumption of responsibility to comply with federal requirements, the determination of equivalence is the responsibility of the EPA Regional Administrator. This situation will only occur in states that do not have authorization but do have state-required financial mechanisms or state assumptions of responsibility. In these situations, equivalence should be determined using the criteria discussed below both for cost estimates and for the specific assurance mechanism being used for compliance. These criteria are based on the benchmarks provided by Subpart H of 40 CFR Parts 264 and 265.

In addition to evaluating the equivalency of the mechanism, the Regional Administrator may only approve use of a state-required mechanism if the instrument has been executed. To do otherwise would result in a gap in coverage which must be avoided. This is in contrast to the program authorization context where financial responsibility requirements may be determined to be equivalent or substantially equivalent prior to the effective date of the requirements, although a State program may not be granted authorization until the State's regulations are effective.

Fundamental Criteria for Equivalence Determinations

Inherent in the federal financial assurance regulations are two criteria which are fundamental for evaluating equivalence:

(1) Certainty of the availability of funds through a financial mechanism must be at least equivalent, and

(2) The amount of funds assured by a financial mechanism must be at least equivalent.

These criteria reflect the Agency's policy that the funds must be available in the appropriate amounts when needed. The criteria are equally applicable when evaluating equivalence in the program authorization context and in the federal/state compliance context. The first criterion is more difficult to evaluate than the second. Of key importance for certainty will be the protection of the funds against claims of creditors, the initial qualifications of financial institutions providing the mechanisms, and provisions required for future contingencies, including bankruptcy, cancellation, or changing mechanisms. With respect to amount of financial assurance, both the total amount of funds assured as well as the amount assured at different points in time are crucial. These criteria are outlined next as thresholds that must be satisfied in addition to criteria appropriate for specific types of mechanisms which are provided later.

Certainty of Availability of the Funds. To be deemed equivalent in terms of certainty, state financial requirements must include minimal qualifications for the parties to mechanisms of financial responsibility and other provisions, as follows:

(1) provision that Regional Administrator or State Director[2] has the sole authority to direct the payment or use of funds assured whenever needed;

---

[2]The phrase "Regional Administrator or State Director" is used in this document because most state mechanisms are expected to name a state agency as beneficiary. Due to the variety in state agencies and their authorities, the specific "State Director" may vary from state to state (e.g., Attorney General, Director of Office of Environmental Protection, Public Health Commissioner, State Treasury Department, etc.) The term "State Director" is defined in 40 CFR 122.3. As long as a state agency or official (or the EPA Regional Administrator) is designated as having the power to direct or authorize use of financial assurance, the mechanism should be deemed equivalent, in that respect. However, where two or more state agencies are responsible for administration of financial assurance mechanisms, the "lead" agency should consider establishing an inter-agency memorandum of understanding to clearly delineate the respective roles and responsibilities of each agency.

(2) qualifications for participating financial institutions, surety companies, and insurers -- these institutions and their relevant activities (i.e., trust fund operations) must be subject to some regulatory oversight or licensing procedures

(3) qualifications for guarantors -- including satisfaction of a financial test and being the corporate parent of the owner or operator

(4) qualifications for owners or operators using a financial test -- including independently audited financial statements

(5) substitution of alternate financial assurance within a defined time period in the event the required qualifications are no longer satisfied (for example, including the bankruptcy of the financial institution, corporate guarantor, or insurer);

(6) notification within a limited time period after the commencement of a bankruptcy proceeding naming the owner or operator as debtor;

(7) notification within a limited time period of intent to cancel, terminate, or allow to lapse a financial assurance mechanism;

(8) provision that an existing mechanism will not be cancelled, terminated, or allowed to lapse until a defined time period has elapsed, or alternate assurance has been provided, or the owner or operator has been released from financial requirements;

(9) provision that the mechanisms cannot be cancelled or terminated upon commencement of a compliance action; and

(10) no restrictions on order of use of mechanisms if more than one mechanism provides assurance for a given facility.

These provisions are further specified in the equivalency criteria for specific financial responsibility mechanisms.

Amount of Funds. In general, the amount of funds assured for closure and/or post-closure care must be equal to the current cost estimate(s) and the liability coverage demonstrated must be at least equal to the amounts required by RCRA liability requirements, exclusive of legal defense costs. An exception can be made for owners and operators using trust funds for closure/post-closure assurance; the full amount need not be available if the

owner or operator is in the pay-in period for the trust fund. (See, e.g., 264/265.143(a)(3).) In that case, an increasing amount will be assured each year. For all other mechanisms alone or in combination, the amounts assured must always meet the total RCRA requirements at all times.

Thus, with respect to the amount of funds assured, the following criteria must be met:

(1) The amount assured must equal the latest cost estimate for closure and/or post-closure care in full, unless the trust fund mechanism is being used.

(2) If a trust fund is used, the initial and subsequent payments must assure an amount of closure and/or post-closure funds each year that in the aggregate is no less than that required by the federal formula.

(3) If a trust fund pay-in period is used, it must not be longer than that allowed under the federal regulations.

(4) The amounts of funds assured for different identified facilities and purposes (i.e., closure, post-closure care, liability) must be specifically identified in the instrument or by an attachment to the instrument.

(5) The Regional Administrator or State Director must have exclusive authority over disbursements of funds.

(6) The funds cannot be used for other purposes (e.g., payment of fines).

(7) The Regional Administrator or State Director must approve in writing any decreases in the amounts of assurance provided.

(8) The Regional Administrator or State Director must have the authority to withhold a portion of the reimbursement for closure expenses if deemed necessary.

The federal regulations allow owners or operators to use combinations of mechanisms to provide the required amount of assurance. States can do likewise. So long as each mechanism is equivalent in terms of certainty of the funds, the focus is properly on the total amount assured by the mechanisms. See 40 CFR 264/265.143(g).

Time Limits. Time limits in state financial mechanisms may not always parallel the federal requirements. This does not necessarily mean that the state mechanisms are not equivalent. However, the federal regulations are based on considerations of the legal and practical implications of deadlines that cannot be ignored by state mechanisms. The ultimate aim must be to

ensure that there is no gap in financial coverage. This means that sufficient time must be allowed for:

- providing an alternate mechanism in the event of the incapacity, disqualification, or bankruptcy of issuers, insurers, and guarantors (e.g., 60 days).
- responding to a notice of cancellation or termination (e.g., at least 30-60 days)
- alternate assurance of funds before a cancellation could become effective (e.g., at least 60-90 days)
- notifying the Regional Administrator or State Director of the commencement of a bankruptcy proceeding naming the owner or operator as debtor (e.g., no more than 10 days but probably no less)
- review by the Regional Administrator or State Director of financial assurance submissions for new facilities (e.g., at least 10-15 days before first receipt of wastes)

States should be encouraged to follow the deadlines in federal system but some flexibility may be allowed when determining equivalence. The period of post-closure care, however, must be at least thirty years.

Allowable Mechanisms. Current federal regulations allow use of trust funds, surety bonds, letters of credit, insurance, a financial test, corporate guarantees, and state assumptions of responsibility. Some states may allow owners or operators to demonstrate financial responsibility using mechanisms not currently allowed under RCRA standards. Specifically, these might include:

- cash deposits
- certificates of deposit
- escrow accounts

The equivalency of cash deposits or certificates of deposit can be assessed using the federal trust fund requirements as a touchstone. Thus, pay-in periods, payment formulae, and rules for reimbursement of expenses must be at least as stringent as under the federal regulations. Where state regulations require immediate deposit of the full amount, the focus should shift to whether further payments are required to keep pace with later increases in cost estimates. Equivalency criteria for cash deposits and certificates of deposit are presented later in this document.

An escrow is similar to a trust arrangement but it has a somewhat different legal effect. Although the depositary institution is not a trustee, it is a fiduciary (as is a trustee) and its actions are governed by an escrow agreement that should resemble the trust agreement. The key terms and responsibilities must be spelled out in the agreement; an escrow agent has no

discretion and must follow the instructions of the escrow agreement to the letter. Equivalency criteria for escrows are presented later in this document

Cost Estimates. To be equivalent to federal requirements, state financial responsibility programs and mechanisms must incorporate equivalent rules for estimating the costs of closure and post-closure care that are to be assured. The evaluation of equivalency will depend on affirmative answers to the following questions:

(1) Must cost estimates for closure and post-closure be based on closure and post-closure plans?

(2) Must cost estimates be revised accordingly whenever changes in closure or post-closure plans would increase cost estimates?

(3) Must the closure cost estimate equal the cost of closure at the point in the facility's operating life when closure would be the most expensive?

(4) Must the cost estimates be adjusted for inflation at least annually during the operating life of the facility using a specified inflation factor?

(5) Must the latest cost estimate based on the closure and/or post-closure plan(s) and the latest adjusted cost estimate(s) be kept at the facility?

The rest of this document sets forth a series of criteria for determining the equivalency of individual state financial assurance mechanisms. Closure or post-closure mechanisms allowed by the federal regulations are addressed first, followed by mechanisms not allowed in the current federal regulations, concluding with liability coverage mechanisms and state assumptions of responsibility.

Further Information

Readers desiring further information should consult the **Guidance Manuals on Financial Assurance for Closure and Post-Closure Care** and **Liability Coverage** and the Background Documents cited there.

EQUIVALENCY CRITERIA FOR STATE TRUST FUNDS

EPA will consider the following factors in determining whether a state-required trust fund is "equivalent" or "substantially equivalent" to the financial mechanisms prescribed in the federal regulations. As a general rule, most, if not all of the following questions must be answered "yes" for the state-required trust fund to be considered "equivalent" or "substantially equivalent."

1. Is the trustee required to be an entity that has authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency?

2. Does the trust agreement or an attached schedule list and identify the facilities and the amount of the closure and/or post-closure cost estimates covered for each facility?

3. Is the owner or operator required to update the list of facilities and closure and/or post-closure cost estimates after each change in cost estimates?

4. Does the owner or operator remain liable at all times for the full amount of closure and/or post-closure expenses?

5. Is the trust irrevocable except upon agreement of the owner or operator, the trustee, and the Regional Administrator or State Director?

6. Does the trust agreement prohibit trustees from investing in securities of the owner or operator or parent corporations or their affiliates? (federal regulations include this prohibition in addition to the general "prudent man" standard. See 40 CFR 264.151(a)(1).)

7. For new facilities to be permitted, must the trust agreement be submitted to the Regional Administrator or State Director before hazardous waste is first received?

8. Must the initial payment be made before hazardous waste is first received for new permitted facilities?

9. For new permitted facilities, must a receipt from the trustee for the first payment be submitted to the Regional Administrator or State Director before hazardous waste is first received at the facility?

10. Are the required initial and annual payments at least as great as those required by the federal RCRA regulations? (covers pay-in period or other formulae)*

---

* For details on the pay-in period and payment formula, see Chapter III in the Guidance Manual: Financial Assurance for Closure and Post-Closure Care (1982).

11. Does the trust agreement require the trustee, during the pay-in period, to notify the Regional Administrator or State Director if the owner or operator fails to make an annual payment into the trust fund?

12. Does the trust agreement require the trustee to value the assets in the trust fund each year and send a statement of valuation and trust activity to the owner or operator and the Regional Administrator or State Director?

13. Is the owner or operator given at least 90 days following the trustee's valuation report to object to the trust investment activity?

14. May EPA or State Director object at any time to the trust investment activity?

15. Once the pay-in period has expired, must the owner or operator make additional payments into the trust fund or obtain alternate assurance whenever the cost estimate changes and becomes greater than the value of the trust fund during the operating life of the facility?

16. Must the owner or operator make arrangements for a new trustee or obtain other financial assurance when the existing trustee enters bankruptcy, ceases operations, or loses its authority to act as a trustee?

17. Can the trustee only be changed upon agreement by the owner or operator, the trustee, and the Regional Administrator or State Director?

18. Can funds be released from the trust fund only upon instruction of the Regional Administrator or State Director and only for the following reasons: (1) the value of the trust fund is greater than the current cost estimate(s); (2) alternate financial assurance is provided; (3) the owner or operator is released from financial responsibility requirements.

19. Must itemized bills for closure and/or post-closure care be submitted to the Regional Administrator or State Director before reimbursement will be authorized?

20. Where the cost of closure appears to be significantly greater than the value of the trust fund, is the Regional Administrator or State Director empowered to withhold reimbursement from the trust until satisfactory certification of completion of closure is received?

21. May the trust be terminated only upon written instruction of the Regional Administrator or State Director?

EQUIVALENCY CRITERIA FOR SURETY BONDS

EPA will consider the following factors in determining whether a state-required surety bond is "equivalent" or "substantially equivalent" to the financial mechanisms prescribed in the federal regulations. As a general rule, most, if not all of the following questions must be answered "yes" for the state-required surety bond to be considered "equivalent" or "substantially equivalent."

1. Is the surety company required to be listed in Circular 570 or licensed to do business as a surety in the state?

2. Does the underwriting limitation in Circular 570 apply?

3. Must the surety company be licensed in the state where the surety bond is signed?

4. Are the terms of a required standby trust fund (if any) at least equivalent to a standby trust fund under the federal RCRA regulations? (see, e.g., 40 CFR 264.143(b)(3) and the equivalency criteria for standby trust funds, below.)

5. Must the penal sum of the bond, together with any amount being assured by other mechanisms be at least equal to the current closure and/or post-closure cost estimates?

6. Must any surety bond that is used at an interim status facility be a financial guarantee bond? (performance bonds may not be used under 40 CFR 265 regulations.)

7. For new facilities to be permitted, must the surety bond be submitted to the Regional Administrator or State Director before hazardous waste is first received for treatment, storage or disposal?

8. For new permitted facilities, must the surety bond be effective before hazardous waste is first received for treatment, storage or disposal?

9. When cost estimates increase, must the penal sum of the bond be increased (and evidence of the increase submitted to the Regional Administrator or State Director) or alternate financial assurance obtained within a defined period of time? (federal regulations allow 60 days)

10. Can the penal sum be reduced only if cost estimates decrease and following written approval of the Regional Administrator or State Director?

11. Must the owner or operator obtain alternative financial assurance within a defined time period after bankruptcy of the surety or removal of the surety's name from Circular 570?

12. Must the surety give both the owner or operator and the Regional Administrator or State Director ample notice before cancellation of the surety bond will be allowed? (federal regulations require at least 120 days)

13. Will the owner or operator have sufficient time after receipt of notice of cancellation to provide alternative financial assurance and obtain written approval of the new assurance from the Regional Administrator or State Director? (federal regulations require at least 90 days)

14. Is the surety required to pay the penal sum of a financial guarantee bond in at least these circumstances:

a. The owner or operator has failed to provide funds in the amount of the cost estimate for closure and/or post-closure care before the beginning of final closure of the facility;

b. The Regional Administrator, State Director, or a court has ordered closure to begin and the owner or operator has not provided funds within 15 days; or

c. The surety has sent notice of cancellation of the bond and the owner or operator has not obtained alternate financial assurance within a defined time period? (federal regulations allow 90 days)

15. Must the surety perform closure and/or post-closure care or pay the penal sum of a performance bond in at least the following circumstances:

a. The owner or operator fails to fulfill its closure and/or post-closure obligations, even though closure may occur sooner than expected or the requirements in the plans, regulations, and/or permit have changed; or

b. The surety has sent notice of cancellation of the bond and the owner or operator has not obtained alternate financial assurance within 90 days?

16. May a surety bond only be terminated with the written consent of the Regional Administrator or State Director?

17. Must itemized bills for closure and/or post-closure care be submitted to the Regional Administrator or State Director before payment will be authorized?

18. Where the cost of closure appears to be significantly greater than the amount of available funds, is the Regional Administrator or State Director empowered to withhold reimbursement until satisfactory certification of completion of closure is received?

EQUIVALENCY CRITERIA FOR LETTERS OF CREDIT

EPA will consider the following factors in determining whether a state-required letter of credit is "equivalent" or "substantially equivalent" to the financial mechanisms prescribed in the federal regulations. As a general rule, most, if not all of the following questions must be answered "yes" for the state-required letter of credit to be considered "equivalent" or "substantially equivalent."

1. Is the issuer required to be authorized to issue letters of credit, and must its letter of credit operations be regulated by a state or federal agency?

2. Are the terms of a required standby trust fund (if any) at least equivalent to the required standby trust fund under the federal RCRA regulations? (see, e.g., 40 CFR 264.143(d)(3) and the equivalency criteria for standby trust funds, below.)

3. Must the letter of credit be irrevocable for at least a year and provide for automatic extensions?

4. Does the letter of credit have to be accompanied by a letter or schedule detailing the coverage for each facility?

5. Must the owner or operator submit evidence within a reasonable period that any cost increases are covered by alternate mechanisms or increases in the face amount of the letter of credit? (federal regulations allow up to 60 days.)

6. Must owners or operators obtain alternate financial assurance within a specified time if the issuing institution ceases operations, files for bankruptcy, or otherwise ceases to qualify? (federal regulations allow up to 60 days.)

7. Must alternate assurance be obtained within a specified time if the issuer gives notice of nonrenewal of the letter? (federal regulations allow up to 90 days.)

8. Must the face amount of the letter of credit, together with any amount being assured by other mechanisms be at least equal to the current closure and post-closure cost estimates?

9. Must the letter of credit be submitted to the Regional Administrator or State Director by a specified time before hazardous waste is first received for new permitted facilities? (federal regulations require at least 60 days.)

10. For new facilities to be permitted, must the letter of credit be effective before hazardous waste is first received for treatment, storage or disposal?

11. Can the amount be reduced only if cost estimates decrease and following written approval of the Regional Administrator or State Director?

12. Must itemized bills for closure and/or post-closure care be submitted to the Regional Administrator or State Director before reimbursement will be authorized?

13. Where the cost of closure appears to be significantly greater than the amount of funds available under the letter of credit, is the Regional Administrator or State Director empowered to withhold reimbursement until satisfactory certification of completion of closure is received?

14. Is termination of the letter of credit only allowed if (1) alternate assurance is provided, or (2) the owner or operator has been released from closure or post-closure financial requirements?

EQUIVALENCY CRITERIA FOR STANDBY TRUST FUNDS

There is an important difference between state and federal legal authorities which may affect state mechanisms. Because the U.S. EPA does not have the authority to collect, hold or disburse financial assurance funds itself, the RCRA regulations require the use of a standby trust fund in conjunction with surety bonds and letters of credit. Some states, on the other hand, may not have this restriction, thus they may not need to require standby trust funds. The lack of standby trust provisions does not necessarily mean that the state mechanism is not equivalent. If the state does require standby trusts, they must meet the equivalency criteria set out below.

EPA will consider the following factors in determining whether a state-required standby trust fund is "equivalent" or "substantially equivalent" to the financial mechanisms prescribed in the federal regulations. As a general rule, most, if not all of the following questions must be answered "yes" for the state-required standby trust fund to be considered "equivalent" or "substantially equivalent."

1. Is the trustee required to be an entity that has authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency?

2. Does the trust agreement or an attached schedule list the facilities and the amount of the closure and/or post-closure cost estimates covered for each facility?

3. Is the trust irrevocable except upon agreement of the owner or operator, the trustee, and the Regional Administrator or State Director?

4. Does the trust agreement prohibit trustees from investing in securities of the owner or operator or parent corporations? (federal regulations include this prohibition in addition to the general "prudent man" standard.)

5. If closure is not performed, does the trust have to be funded by the letter of credit, surety bond, or other mechanisms (a) before final closure or (b) within a specified period after the Regional Administrator, State Director, or a court orders closure? (federal regulations allow 15 days.)

6. For new facilities to be permitted, must the trust agreement be submitted to the Regional Administrator or State Director before hazardous waste is first received for treatment, storage or disposal?

7. Is the owner or operator given at least 90 days to object to the trust investment activity?

8. May EPA or State Director object at any time to the trust investment activity?

9. Must the owner or operator make arrangements for a new trustee or obtain other financial assurance when the existing trustee enters bankruptcy, ceases operations, or loses its authority to act as a trustee?

10. Can the trustee only be changed upon agreement by the owner or operator, the trustee, and the Regional Administrator or State Director?

11. Where the cost of closure appears to be significantly greater than the amount of funds in the trust, is the Regional Administrator or State Director authorized to withhold reimbursement until satisfactory certification of completion of closure is received?

12. Must itemized bills for closure and/or post-closure care be submitted to the Regional Administrator or State Director before payment will be authorized?

EQUIVALENCY CRITERIA FOR CLOSURE OR POST-CLOSURE INSURANCE

EPA will consider the following factors in determining whether state-required closure or post-closure insurance is "equivalent" or "substantially equivalent" to the financial mechanisms prescribed in the federal regulations. As a general rule, most, if not all of the following questions must be answered "yes" for the state-required closure or post-closure insurance to be considered "equivalent" or "substantially equivalent."

1. Is the insurer required to be licensed to transact the business of insurance or eligible as a provider of excess or surplus lines insurance in one or more states?

2. Must the insurance certificate, policy, or endorsement list the facilities covered and the amounts of insurance for closure and/or post-closure care assured for each facility?

3. Must an insurance certificate or endorsement be submitted as evidence of insurance?

4. Does the insurance policy provide that closure and/or post-closure funds will be provided whenever closure occurs?

5. Does the insurance policy, certificate, or endorsement provide that the insurer will be responsible for paying out funds to parties specified upon the direction of the Regional Administrator or State Director?

6. For new facilities to be permitted, must the insurance policy, certificate, or endorsement be submitted to the Regional Administrator or State Director before hazardous waste is first received for treatment, storage or disposal?

7. For new facilities to be permitted, must the insurance policy be effective before hazardous waste is first received?

8. Must the face amount of the policy, together with any amount being assured by other mechanisms, be at least equal to the current closure and/or post-closure cost estimates?

9. Must the insurance policy provide for automatic renewal at least at the face amount of the expiring policy?

10. When cost estimates increase, must the face amount of the policy be increased accordingly (and evidence of the increase submitted to the Regional Administrator or State Director) or alternate assurance obtained within a defined time period? (federal regulations allow 60 days)

11. Can the face amount only be reduced when cost estimates decrease and following written approval of the Regional Administrator or State Director?

12. Must the owner or operator obtain alternative financial assurance within a defined time period following disqualification or liquidation of the insurer?

13. Must the insurer give both the owner or operator and the Regional Administrator or State Director sufficient notice before cancellation of the insurance policy will be allowed? (federal regulations require at least 120 days notice)

14. Must cancellation, termination, or failure to renew not occur and the policy remain in full force and effect in the event that on or before the date of expiration at least one of the following has occurred: (1) the Regional Administrator or State Director has deemed the facility abandoned; or (2) the permit is removed or terminated or a new permit is denied; or (3) closure is ordered by a competent authority (court, Regional Administrator, or State Director); or (4) the premium overdue is paid?

15. Must itemized bills for closure and/or post-closure care be submitted to the Regional Administrator or State Director before reimbursement will be authorized?

16. Where the cost of closure appears to be significantly greater than the face amount of the policy, is the Regional Administrator or State Director authorized to withhold reimbursement until satisfactory certification of completion of closure is received?

EQUIVALENCY CRITERIA FOR FINANCIAL TEST AND CORPORATE GUARANTEE FOR CLOSURE AND POST-CLOSURE CARE

EPA will consider the following factors in determining whether a state-required financial test or corporate guarantee is "equivalent" or "substantially equivalent" to the financial mechanisms prescribed in the federal regulations. As a general rule, most, if not all of the following questions must be answered "yes" for the state-required financial test or corporate guarantee to be considered "equivalent" or "substantially equivalent."

1. Are the owner's, operator's or corporate parent's financial statements required to be independently audited?

2. Does the independent public accountant have to be certified by a State Board of Accountancy or otherwise eligible to practice public accounting in the state?

3. Are the state's financial test criteria at least as stringent as the federal criteria? Specifically:

   A. Do bond ratings of the firm have to be at least investment grade; or does net working capital have to be six times the sum of closure and post-closure cost estimates, and do two of the following three conditions have to be satisfied:

      i) total liabilities to net worth have to be less than 2.0,

      ii) net income plus non-cash expenses (i.e., depreciation, depletion, and amortization) to total liabilities have to be greater than 0.1, or

      iii) current assets to current liabilities greater than 1.5?

   B. Does the tangible net worth of the firm have to be at least $10 million and at least six times the sum of closure and post-closure estimates?

   C. Do assets in the United States amount to

      i) 90 percent of the total assets, or

      ii) six times the sum of closure and post-closure estimates?

4. Are firms whose financial statements receive an adverse opinion or a disclaimer of opinion in auditor's standard report disallowed from the financial test?

5. Is the Regional Administrator or State Director granted discretion to accept or reject qualified opinions on a firm's financial statements?

6. Must the corporate parent own at least 50 percent of the voting stock of the subsidiary owner or operator?

7. Must the financial test criteria be applied to the closure or post-closure cost estimates of all facilities for which there is no third party guarantee or funding of financial assurance? (federal regulations require the inclusion of facilities covered by the financial test guarantee, the corporate guarantee, facilities covered by state financial tests or corporate guarantees, and sites for which no financial assurance has been demonstrated.)

8. Must the owner, operator, or corporate parent continue to satisfy the test requirements, or supply alternate assurance, if closure or post-closure cost estimates increase?

9. Must the owner, operator, or corporate parent submit updated information a short time after the close of the firm's fiscal year? (federal regulations allow up to 90 days -- see 40 CFR 264.143(f)(3).)

10. If the financial statements indicate the firm no longer qualifies to use the financial test, must the owner or operator:

a) Notify the Regional Administrator or State Director within a specified period? (federal regulations allow no more than 90 days after the close of the fiscal year), and

b) Provide alternate financial assurance shortly thereafter? (federal regulations allow up to 120 days after close of the fiscal year).

11. Does the Regional Administrator or State counterpart have the authority to request additional financial reports from the owner, operator, or corporate parent, and disqualify the firm at any time on the basis of such reports or other information?

12. Must satisfaction of the financial test criteria be demonstrated at a specified period before wastes are received at a new facility? (federal regulations require at least 60 days for new permitted facilities -- see 40 CFR 264.143(f)(4).)

13. Is the parent guarantor held responsible for the closure or post-closure costs until:

a. The owner or operator has been released from the financial assurance requirements, or

b. The owner or operator has obtained alternate assurance within a specified period after notice of cancellation of the guarantee has been received? (federal regulations require no more than 90 days.)

EQUIVALENCY CRITERIA FOR CASH DEPOSITS AND CERTIFICATES OF DEPOSIT

EPA will consider the following factors in determining whether a state-required cash deposit or certificate of deposit is "equivalent" or "substantially equivalent" to the financial mechanisms prescribed in the federal regulations. As a general rule, most, if not all of the following questions must be answered "yes" for the state-required cash deposit or certificate of deposit to be considered "equivalent" or "substantially equivalent."

1. Must the bank or financial institution holding the cash deposit or certificate of deposit be regulated and examined by a federal or state agency?

2. Must the Regional Administrator or State Director be the beneficiary and be empowered to draw upon or direct payment from the funds if the owner or operator fails to perform closure or post-closure care?

3. For new facilities to be permitted, must the cash deposit or certificate of deposit be established before hazardous waste is first received for treatment, storage or disposal?

4. Must payments be made pursuant to a pay-in period and formula at least equivalent to federal RCRA trust fund requirements?

5. Must advance notice be provided to the Regional Administrator or State Director in a defined time period prior to termination by the owner or operator?

6. Must at least one of the following conditions be met for the cash deposit or certificate of deposit to be terminated: (1) the owner or operator has performed closure/post-closure to the State Director's or Regional Administrator's satisfaction, or (2) alternate assurance has been established (a) in accordance with state regulations or (b) that would be acceptable under 40 CFR 264/265.149?

7. Can funds be released only upon written instruction of the Regional Administrator or State Director?

8. Must itemized bills for closure and/or post-closure care be submitted to the Regional Administrator or State Director before payment will be authorized?

9. Where the cost of closure appears significantly greater than the amount of available funds, is the Regional Administrator or State Director empowered to withhold reimbursement until satisfactory certification of closure is received?

EQUIVALENCY CRITERIA FOR ESCROWS

EPA will consider the following factors in determining whether a state-required escrow is "equivalent" or "substantially equivalent" to the financial mechanisms prescribed in the federal regulations. As a general rule, most, if not all of the following questions must be answered "yes" for the state-required escrow to be considered "equivalent" or "substantially equivalent."

1. Is the depositary institution licensed or authorized to act as a fiduciary or escrow agent and subject to state or federal regulatory oversight?

2. Does the escrow agreement or an attached schedule list the facilities and the amount of the closure and/or post-closure cost estimates covered for each facility?

3. Is the owner or operator required to update the list of facilities and closure and/or post-closure cost estimates after each change in cost estimates?

4. Does the owner or operator remain liable at all times for the full amount of closure and/or post-closure expenses?

5. Does the escrow agreement prohibit the depositary from investing in securities of the owner or operator or parent corporations?

6. Is the escrow agreement irrevocable except upon the mutual consent of the owner or operator and the Regional Administrator or State Director?

7. For new facilities to be permitted, must the escrow agreement be submitted to the Regional Administrator or State Director before hazardous waste is first received for treatment, storage or disposal?

8. Must the initial payment be made before hazardous waste is first received for new permitted facilities?

9. Are the required initial and annual payments at least as great as those required by the federal RCRA trust fund regulations?

10. Does the escrow agreement require the depositary to notify the Regional Administrator or State Director if the owner or operator fails to make a required deposit?

11. Does the escrow agreement require the depositary to value the assets in the escrow each year and send a statement of valuation to the owner or operator and the Regional Administrator or State Director?

12. May the owner or operator and the Regional Administrator or State Director object at any time to escrow activity?

13. If the pay-in period is less than the operating life of the facility, must the owner or operator make additional payments to the escrow or obtain alternate assurance whenever the cost estimate(s) become(s) greater than the value of the escrow?

14. Must the owner or operator make arrangements for a new depositary or obtain other financial assurance when the existing depositary enters bankruptcy, ceases operations, or loses its authority to act as an escrow agent?

15. Can the depositary only be changed by mutual agreement of the owner or operator and the Regional Administrator or State Director?

16. Can funds be released from escrow only upon instruction of the Regional Administrator or State Director?

17. Must itemized bills for closure and/or post-closure care be submitted to the Regional Administrator or State Director before payment will be authorized?

18. Where the cost of closure appears significantly greater than the value of the escrow, is the Regional Administrator or State Director empowered to withhold reimbursement from the escrow until satisfactory certification of closure is received?

19. May the escrow agreement be terminated only upon instruction of the Regional Administrator or State Director?

EQUIVALENCY CRITERIA FOR LIABILITY INSURANCE

EPA will consider the following factors in determining whether state-required liability insurance is "equivalent" or "substantially equivalent" to the financial mechanisms prescribed in the federal regulations. As a general rule, most, if not all of the following questions must be answered "yes" for the state-required liability insurance to be considered "equivalent" or "substantially equivalent."

1. Is the insurer required to be licensed to transact the business of insurance or eligible as a provider of excess or surplus lines insurance in one or more states?

2. Must the insurance certificate, policy, or endorsement list the facilities covered?

3. Must an insurance certificate or endorsement be submitted as evidence of insurance?

4. Must the policy cover both bodily injury and property damage claims?

5. Must the policy provide -- exclusive of legal defense costs -- at least: (1) $1 million coverage per occurrence, with an annual aggregate amount of $2 million, for sudden accidental occurrences?; and (2) $3 million coverage per occurrence, with an annual aggregate amount of $6 million, for nonsudden accidental occurrences? (the nonsudden accidental coverage must be required of surface impoundments, landfills, and land treatment facilities.)

6. Must the coverage be on a "first dollar" basis?*

7. For sudden accidental occurrences, must the insurance policy be effective before initial receipt of waste at a new permitted facility?

8. For nonsudden accidental occurrences, must coverage be demonstrated by the following dates depending on the sales or revenues of the owner or operator?

(a)	Sales or revenues over $10 million	January 15, 1983
(b)	Sales or revenues greater than $5 million and up to $10 million	January 15, 1984
(c)	Sales or revenues $5 million and less	January 15, 1985

---

* For details, see Chapter 2 of the Guidance Manual: Liability Coverage (1982).

9. Must the owner or operator maintain the policy in full force and effect at least until released from financial requirements or alternate coverage is substituted?

10. Must the owner or operator provide alternate coverage within a defined time period in the event of liquidation or insolvency of the insurer? (federal regulations allow 60 days)

11. Must the insurer give ample notice of its intent to cancel, terminate, or not to renew the insurance?

12. Must cancellation or termination not occur during a defined time period following the date of receipt of the notice by the Regional Administrator or State Director? (federal regulations require 60 days for cancellation and 30 days for termination)

EQUIVALENCY CRITERIA FOR FINANCIAL TEST FOR LIABILITY COVERAGE

EPA will consider the following factors in determining whether a state-required financial test for liability coverage is "equivalent" or "substantially equivalent" to the financial mechanisms prescribed in the federal regulations. As a general rule, most, if not all of the following questions must be answered "yes" for the state-required financial test for liability coverage to be considered "equivalent" or "substantially equivalent."

1. Must the owner's or operator's financial statements be independently audited?

2. Does the independent public accountant have to be certified by a State Board of Accountancy?

3. Are the financial test criteria at least as stringent as the federal RCRA criteria?

   A. Do bond ratings of the firm have to be at least investment grade; or does net working capital have to be at least six times the amount aggregate liability requirements?

   B. Does the tangible net worth of the firm have to be at least $10 million and at least six times the annual aggregate liability requirements?

   C. Do assets in the United States amount to at least

      i) 90 percent of total assets, or
      ii) six times the annual aggregate liability requirements?

4. Are firms whose financial statements have received adverse opinions or disclaimers of opinions disallowed from the financial test?

5. Is the Regional Administrator or State Director granted discretion to accept or reject qualified opinions on a firm's financial statements?

6. Must evidence of insurance be provided in a specified period if a notice of disallowance has been issued because of an adverse, qualified, or disclaimer of opinion? (federal regulations allow up to 30 days.)

7. Must the financial test criteria cover -- exclusive of legal defense costs -- at least (1) $1 million coverage per occurrence, with an annual aggregate amount of $2 million, for sudden accidental occurrences?; (2) $3 million coverage per occurrence, with an annual aggregate amount of $6 million, for nonsudden accidental occurrences?; and (3) all closure or

post-closure cost estimates of facilities not covered by third party guarantees or funded mechanisms? (federal regulations require the inclusion of facilities covered by the financial test, the corporate guarantee, and facilities without any coverage at all.)

8. For sudden accidental occurrences, must the financial test criteria be satisfied before initial receipt of waste by new permitted facilities?

9. For nonsudden occurrences, must coverage be demonstrated by the following dates depending on the sales or revenues of the owner or operator?

(a)	Sales or revenues over $10 million	January 15, 1983
(b)	Sales or revenues greater than $5 million and up to $10 million	January 15, 1984
(c)	Sales or revenues $5 million and less	January 15, 1985

10. Must the owner or operator completely satisfy the test criteria at least until released from financial requirements or alternate coverage is substituted?

11. Must the owner or operator submit updated financial test information a short time after the close of the firm's fiscal year? (federal regulations allow up to 90 days.)

12. If the year-end financial statements indicate the firm no longer qualifies to use the financial test, must the owner or operator supply evidence of liability insurance within a limited period? (federal regulations allow up to 90 days.)

EQUIVALENCY CRITERIA FOR STATE ASSUMPTIONS OF RESPONSIBILITY

EPA will consider the following factors in determining whether a state's assumption of responsibility for an owner's or operator's closure, post-closure care, or liability coverage is "equivalent" or "substantially equivalent" to the financial mechanisms prescribed in the federal regulations. As a general rule, most, if not all, of the following questions must be answered "yes" for the state's assumption of responsibility to be considered "equivalent" or "substantially equivalent."

1. Does the letter from the State include, or have attached to it, identifying information for the facilities and the amounts of funds for closure, or post-closure care, or liability coverage that are guaranteed by the State?

2. Is the assumption of responsibility non-contingent and irrevocable; in other words, are there no conditions which would void the state's guarantee?*

3. Does the assumption cover the costs of all activities required for proper closure?

4. Does the assumption cover the costs of all activities required for post-closure care for a period of thirty years?

5. Does the assumption provide liability coverage for bodily injury in at least the amounts required by federal standards per occurrence and in an annual aggregate, exclusive of legal defense costs?

6. Does the assumption provide liability coverage for property damage in at least the amounts required by federal standards per occurrence and in an annual aggregate, exclusive of legal defense costs?

7. Does the assumption provide liability coverage in the amounts required by federal standards for sudden accidental occurrences?

8. Does the assumption provide liability coverage for landfills, surface impoundments, and land treatment facilities in the amounts required by federal standards for non-sudden accidental occurrences?

---

* Note: The Agency is aware of some state post-closure funds that are available only to owners or operators of facilities that have been issued permits under RCRA; these funds would not be non-contingent with respect to interim status or non-permitted facilities.